

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

May 26, 2006

In the Matter of

Jeffrey Murray, Individually, and
The Two Seventy Three Main Street
Realty Trust

Docket No. DEP-05-134
File No. PAN-CE-04-C002

Final Decision

This case involves a Penalty Assessment Notice (PAN) for \$97,031.25 for various violations of the Department's air pollution regulations, 310 CMR 7.15(1), related to improper removal of asbestos containing materials during the renovation of a farmhouse at 273 Main Street in Oxford. The PAN was issued on September 17, 2004 to Jeffrey Murray, individually, and Gary L. Kettle, individually and as trustee of Two Seventy Three Main Street Realty Trust (according to the PAN, Murray and Kettle own the beneficial interest in the Trust). The PAN stated that each had a right to an adjudicatory hearing. An appeal was filed by Mr. Murray, individually, and the Trust, denying the Department's allegations and asserting that the penalty amount was excessive. Mr. Kettle did not appeal, either individually or as trustee.

At the prehearing conference, the Department filed a motion to amend the PAN, based on a change in enforcement policy, from \$97,031.25 to \$37,187.50. The Department also moved to dismiss the Trust as a party because Mr. Murray, as a beneficiary rather than trustee, did not have authority to bring the claim on behalf of the

Trust. The petitioner did not oppose either motion, nor did the Administrative Magistrate rule on either motion. The Department submitted prefiled testimony of its witnesses.¹ When the Petitioner failed to submit its prefiled testimony, the Department moved to dismiss for failure to prosecute. The Administrative Magistrate cancelled the hearing and ordered the Petitioner to show cause why the appeal should not be dismissed. After the Petitioner failed to respond, the Administrative Magistrate recommended that the penalty of \$97,031.25 issued to Murray and the Trust be made final.

I conclude that the Petitioner's appeal is properly dismissed for failure to prosecute. The PAN was properly served on Mr. Murray at 45 Prospect Street, Auburn and he exercised his right of appeal, only to default.² Although under the Administrative Penalty regulations at 310 CMR 5.35 and 5.37(2)(a)(1) failure to appeal constitutes waiver and the penalty is then due, from the record it appears that the PAN was not served on Mr. Kettle, either individually or as trustee, or on the Trust, so neither he nor the Trust has anything from which to appeal and neither is responsible for the penalty or any portion thereof.³ Mr. Murray is therefore solely responsible for the penalty.⁴

¹ The prefiled testimony of the Department's witnesses explained the basis for both the original penalty amount and the recalculation.

² A Penalty Assessment Notice must be served as required by 310 CMR 5.33 on the person on whom the Department seeks to assess the penalty. When service is by certified mail, return receipt requested, the PAN must be addressed to the person's last known address or to any officer, employee, or agent of the person authorized by the person or by law to accept service. 310 CMR 5.33(3). While the regulations allow the assessment of a penalty on more than one person, the PAN must be mailed to each person at the appropriate address. From the Department's letter accompanying the PAN, it appears that the PAN was issued to Murray, Kettle, and the Trust, and indicated that each had a right to appeal, but was sent to one address, 45 Prospect Street, Auburn, MA. The Notice of Claim identifies as a Petitioner "Jeffrey Murray, Individually, 45 Prospect Street, Auburn."

³ I also concur with the Department that Jeffrey Murray did not have standing to appeal on behalf of the Trust.

⁴ Because the Department issued the PAN to multiple parties, attributed the violations to them collectively and calculated a single penalty for the violations, it appears that the penalty was assessed jointly and severally on the parties. Mr. Murray was not prejudiced by the lack of service to Mr. Kettle or the Trust, as the Department could have chosen to serve only Mr. Murray and the burden of proof had the hearing gone forward was on the Department as to Mr. Murray's actions. Mr. Murray chose not to prosecute his appeal.

The remaining question is the amount of the penalty. The Department had moved to amend the penalty, resulting in a substantial reduction. Not unexpectedly, the motion was unopposed. The Administrative Magistrate, however, did not rule on the motion. While I do not excuse the Petitioner's failure to file testimony, I would have granted the motion to amend the penalty amount. I therefore assess a penalty of \$37,187.50 on Jeffrey Murray for violations of 310 CMR 7.15(1).

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Decision, pursuant to 310 CMR 1.01 (14)(d). The motion must be filed with the Docket Clerk and served on all parties within seven business days of the postmark date of this Decision. Any party may appeal this Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Decision.

This final document copy is being provided to you electronically by the Department of Environmental Protection. A signed copy of this document is on file at the DEP office listed on the letterhead.

Robert W. Golledge, Jr.
Commissioner

